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NO. 72-299

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

PILGRIM EQUIPMENT COMPANY OF HOUSTON,
Petitioner

v.

THE STATE OF TEXAS, ET AL,
Respondents

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS, HOUSTON, FIRST SUPREME JUDICIAL DISTRICT OF TEXAS

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS, HOUSTON, FIRST SUPREME JUDICIAL DISTRICT OF TEXAS

To The Honorable Supreme Court Of The United States:

The Respondents, the State of Texas and County of Harris, file this opposition to the Petition for Writ of Certiorari filed by Petitioner to review the judgment of the Court of Civil Appeals for the First Supreme Judicial District of the State of Texas.

QUESTION PRESENTED

Did the Court of Civil Appeals err in affirming the judgment of the trial court on the grounds (1) that Petitioner failed to adequately preserve its alleged error and (2) that a consideration of Petitioner's points on the merits relating to such alleged error leads to the conclusion that the trial court did not err in refusing to allow recovery as separate items of damage the loss of profits sustained by Petitioner's business, the costs incurred in readapting Petitioner's remainder property, or the moving costs incurred by Petitioner, all allegedly arising as the result of the condemnation of a portion of Petitioner's property?

STATEMENT

Respondents, the State of Texas and Harris County, by this suit in the County Civil Court at Law No. 1 of Harris County, Texas (Tr. p. 3), have acquired by the right of eminent domain, for highway purposes, two tracts of land, with improvements thereon, belonging to Petitioner, Pilgrim Equipment Company of Houston. The first tract, described as Tract 311, and being a part of Lots 11, 12, 13 and 14 of Stoeckli Place, an addition to the City of Houston, Harris County, Texas, consists of 4,918 square feet of land, after the taking of which Petitioner continued to enjoy the use of a remainder tract consisting of 8,268 square feet of land (S.F. p. 352). The second tract, described as Tract 335, and being a part of Lots 6 and 7 of the said Stoeckli Place Addition, consists of 3,229 square feet of land, after the taking of which Petitioner continued to enjoy the use of a remainder tract consisting of 6,258 square feet of land (S.F. p. 352).

Both properties from which the two tracts in question have been acquired, for some years prior to and at the time of taking in this cause, had been used by Petitioner as a laundry and dry cleaning establishment. Respondents have acquired the two tracts in question for use in the eventual construction of the easterly extension of a freeway installation known as the Southwest Freeway, or U.S. 59, within the City of Houston.

At page 8 of Petitioner's Petition For Writ of Certiorari, it is stated that "(T)he project was largely financed by Federal Highway Trust Funds." This is an incorrect statement. The cost of the right of way for this project is being borne entirely by funds of Harris County, with one-half of such cost to be reimbursed by the State of Texas. There may be plans for the use of federal funds in the construction of the freeway facility itself; however, the record in nowise reflects the past use of federal funds on this project to-date or the planned use of such funds in the future.

Proceedings before the Special Commissioners were regular and in conformity with the statutes and Rules of Civil Procedure. Objections were duly filed by Petitioner to the Award of the Commissioners and the matter became a cause pending in the County Civil Court at Law (Tr. pp. 16 and 38). The parties stipulated to the regularity of all prior proceedings and the date of taking by Respondents was established as June 10, 1969 (Tr. p. 67). Trial by jury before the Honorable Charles C. Castles, Judge of the County Civil Court at Law No. 1, was had commencing on the 28th day of September, 1970 (S.F. p. 2).

The cause was submitted to the jury upon special issues (Tr. p. 68), and in response to the verdict of the jury,

judgment (Tr. p. 67) was entered December 1, 1970, awarding to Respondents the tracts sought to be condemned and to Petitioner the sum of $99,166.00, for the value of the two tracts and for the diminution in value to Petitioner's two remainder tracts. Additionally, the judgment ordered that inasmuch as the initial offer made by Respondents to Petitioner exceeded the verdict of the jury, Petitioner pay the costs of the proceedings before the Special Commissioners and of those in the Trial Court in accordance with Texas law (Art. 3267, V.A.C.S.), and further ordered that Petitioner remit to Respondents the sum of $45,834.00, plus interest from the date of judgment, said sum being that amount by which the Award of the Special Commissioners in the amount of $145,000.00, exceeded the verdict of the jury, Petitioner having earlier withdrawn said Award in full (Tr. p. 25). Petitioner's Motion for New Trial was duly overruled on March 26, 1971, and an appeal was taken to the Court of Civil Appeals, Houston, First Supreme Judicial District of the State of Texas.

From an adverse judgment of the Court of Civil Appeals rendered and filed on November 4, 1971, the opinion of which is set out in full in Appendix "A" hereto, infra, page A-3, Petitioner filed an Application for Writ of Error in the Supreme Court of Texas. That Court by order dated April 26, 1972, a copy of which is set out in Appendix "A", infra, page A-1, refused Petitioner's Application as presenting no error requiring reversal of the judgment of the Court of Civil Appeals. The Supreme Court of Texas further overruled Petitioner's motion for rehearing by order dated May 24, 1972, a copy of which is set out in Appendix "A," infra, A-2. Thereafter, Petitioner filed its Petition for Writ of Certiorari in this Court.

It is respectfully submitted that the verdict and judgment of the Trial Court, the judgment of the Court of Civil Appeals, Houston, First Supreme Judicial District of the State of Texas, and the action of the Supreme Court of Texas on Petitioner's Application for Writ of Error, were proper and correct under the evidence and under both Texas statutory and constitutional law, and were in no way violative of any federal constitutional guarantee enjoyed by Petitioner; therefore, Petitioner's Application for a Writ of Certiorari should be refused by the Supreme Court of the United States.

REASONS FOR DENYING THE WRIT

It should be noted at the outset that it is not without some significance that Petitioner in its Application has been unable to cite to the Supreme Court any federal case authority supporting its position that its federally guaranteed constitutional rights embodied in 28 U.S.C.A. Const. Amend. V and 28 U.S.C.A. Const. Amend. XIV, Sec. 1, have in anyway been violated by the actions of the Houston Court of Civil Appeals and/or the Texas Supreme Court.

In substance, by the five questions presented by Petitioner for review, as set out at pages 3 and 4 of its Petition for a Writ of Certiorari, Petitioner complains of its inability to recover as separate items of damage (1) its moving costs allegedly caused by the partial taking of its property; (2) its costs of readapting its remainder property for continued use as a laundry and dry cleaning plant; and (3) its loss of profits allegedly suffered by reason of the partial taking.

PETITIONER'S QUESTION 1

With regard to Question 1 posed by Petitioner in its brief and its argument relating thereto that the Court of Civil Appeals erred in holding that "the question of adequate compensation was submitted to the jury," a contention which was essentially raised by Petitioner in its brief before the Houston Court of Civil Appeals, that Court declared:

> "By Point No. 1 appellant contends that the judgment based on the jury verdict did not allow appellant just and adequate compensation required by the Constitutions of the United States and the State of Texas. The Constitution of the United States, Amendment V, requires payment of 'just' compensation for property taken for public use. The Constitution of the State of Texas, Art. 1, Sec. 17, requires 'adequate' compensation for property 'taken, damaged or destroyed for or applied to public use.'
>
> "The trial court has entered judgment for appellant in the amount found by the jury in answer to issues submitted in the language suggested by State v. Carpenter, 89 S.W.2d 194 (Tex. 1936). The question of 'adequate compensation' was submitted to the jury. Brunson v. State, 444 S.W.2d 598 (Tex. 1969).
>
> "Since the answers made to these issues are supported by credible evidence, this court cannot substitute its opinion of the value of the property for that of the jury. By this point appellant does not present the question that the answers are contrary to the great weight and preponderance of the evidence. *Point No. 1 is too general to constitute a basis for the reversal of the judgment.* If the judgment is in fact inadequate, that result must have followed from the error of the trial court refusing to admit

> competent testimony offered at the trial; from the error of the trial court in manner of submitting the case to the jury; from the failure of the jury to answer the issues submitted in accordance with the weight and preponderance of the evidence; or from some such specific matter. It is appellant's burden to determine the specific matter which he contends constituted error and probably resulted in the rendition of an improper judgment. This matter must then be presented in accordance with the procedural rules established by law or adopted by the Supreme Court to govern the trial and appeal of civil cases in this state. Art. 3266, V.A.C.S.; Hale v. Lavaca County Flood Control Dist., 344 S.W.2d 245 (Tex. Civ. App.—Houston 1961); Ingram v. Nueces County, 365 S.W.2d 838 (Tex. Civ. App.—San Antonio 1963)." (Emphasis supplied)

Aside from the procedural infirmity of Petitioner's point as indicated by the Court of Civil Appeals, there can be little doubt from a review of the issues which were submitted to the jury, that Petitioner was afforded the fullest guarantee of adequate compensation as required by the constitutional amendments to which Petitioner alludes.

State v. Carpenter, supra, decided by the Texas Supreme Court, is the landmark case in Texas condemnation law and since it was decided, has been and is followed almost without exception by Texas courts in the arrival at "adequate" or "just" compensation for the taking of private property for public purposes. By the issues submitted to the jury by the trial court below, which as the Court of Civil Appeals pointed out were in the language suggested by *State v. Carpenter*, the jury was called upon to determine (1) the value of the part of Petitioner's property that was taken; (2) the value of Petitioner's remainder

property before the taking; and (3) the value of Petitioner's property after the taking. Pursuant to the jury's answers Petitioner recovered the amount assessed by the jury as being the value of the part taken plus the difference in value between Petitioner's remainder property before and after the taking.

That this submission of the case follows the well established pattern for guaranteeing "just compensation" in a partial taking of private property for public use is evidenced by the following from 4A Nichols on Eminent Domain 14-49, Sec. 14.21:

> ". . . the rule is well settled, that when part of a tract of land is taken for public use by eminent domain, just compensation to which the owner is entitled by the constitution includes damages to the remainder of the tract which resulted from the taking, as well as the value of the land taken." See U. S. Supreme Court cases cited in footnote 2 under Sec. 14.2 beginning with *Bauman v. Ross*, 167 U.S. 548, 17 S.Ct. 966 (1897) and cases cited in footnote 2 under Sec. 14.23 beginning with *Sharp v. United States*, 191 U.S. 341, 24 S.Ct. 114 (1903).

In the light of the above well settled rule and the manner of submission of this case in the trial court below, Petitioner's Question 1 should be answered in the negative.

PETITIONER'S QUESTIONS 2 AND 3

By its Questions 2 and 3, and argument relating respectively to each, Petitioner complains that the Court of Civil Appeals erred "by not reversing and remanding the judgment of the trial court on account of the error committed by said court in refusing to allow the introduc-

tion of evidence by the defendant (Petitioner)" as to moving costs (Question 2) and the cost of readapting Petitioner's remainder property after the taking (Question 3).

These particular complaints were not raised before the Houston Court of Civil Appeals and that Court, therefore, was not given the opportunity to pass on these particular alleged errors.

Of the nine points of error presented to the Houston Court of Civil Appeals, the only points relating to moving costs and costs of readapting the Petitioner's remainder property which Petitioner presented to the Court of Civil Appeals were its Points IV and VI in its Brief on appeal to that Court. By its Point IV before the Court of Civil Appeals Petitioner complained that it "should recover its moving cost caused by the taking of a part of its property by Appellees through condemnation, therefore, the trial court erred in rendering the judgment herein." By its Point VI before the Court of Civil Appeals, Petitioner complained that it "should recover the cost of readapting the remainder of its property for continued use thereof as a laundry and dry cleaning plant caused by the taking of a part of its property by the Appellees in condemnation, therefore, the trial court erred in rendering the judgment herein."

By such Points before the Court of Civil Appeals, Petitioner in reality complained of its inability to recover as separate items of damage the costs it incurred in the moving of its machinery, equipment and other personal property, and those it incurred in readapting its remainder property. As to these points the Houston Court of Civil Appeals rightfully declared that "(N)either of these points complains that the (trial)court erred in admitting evidence by appellant . . ."

Of error allegedly committed by a trial court which was not raised by an appellant in the Court of Civil Appeals, the Texas Supreme Court in *Harris v. Windsor*, 294 S.W.2d 798 (Tex. Sup. Ct. 1956), declared:

> ". . . *The point was not raised* in the trial court, *in petitioner's brief as appellant in the Court of Civil Appeals*, or in his motion for rehearing in that court. It is presented for the first time in this court, *and cannot, therefore, be considered.* Rule 469(c), Texas Rules of Civil Procedure; Edwards v. Strong, 147 Tex. 155, 213 S.W.2d 979; East Texas Motor Freight Lines v. Loftis, 148 Tex. 242, 223 S.W.2d 613."

In passing on a similar situation, the United States Supreme Court in *Husty v. United States*, 282 U.S. 694, 51 S.Ct. 240 (1931), declared:

> "In the course of the hearing on the motion, questions by petitioners seeking to establish the name and identity of the officer's informant were excluded. Petitioners ask review of these rulings on the evidence, but we do not consider them, since they were not assigned as error on the appeal to the Court of Appeals, and it does not appear that they were presented or passed upon there. Duignan v. United States, 274 U.S. 195, 200, 47 S.Ct. 566, 71 L.Ed. 996."

In light of the above and foregoing Petitioner's Questions 2 and 3 should be answered in the negative.

PETITIONER'S QUESTIONS 4 AND 5

By Petitioner's Questions 4 and 5 and the respective arguments relating thereto, Petitioner basically complains that the Court of Civil Appeals erred in holding that the

trial court did not err in refusing to allow recovery as separate items of damage, the loss of profits sustained by Petitioner's business, the moving costs and the costs of readapting its remainder, all allegedly incurred by reason of the condemnation of a portion of Petitioner's property.

With regard to this complaint, the Court of Civil Appeals in its opinion declared:

> "Appellant contends that the trial court erred in rendering the judgment herein because appellant was entitled to recover (1) damages for the loss of profits suffered by reason of the partial taking; (2) the cost of readapting the remainder of its property for continued use as a laundry and dry cleaning plant; and (3) the moving costs caused by the partial taking.
>
> "These points of error are stated to be based on Assignments of Error Nos. 2, 3, 5, and 13. The points are too general to comply with the briefing rules. Rule 418, T.R.C.P. Neither of the points complains that the court erred in admitting evidence offered by appellant with improper qualifications, nor do they complain that the trial court erred in refusing to submit properly requested issues. The points are germane to the assignments of error only in the sense that the matters complained of in the assignments of error made it impossible for appellant to secure jury findings on which to base a judgment for the specific additional damages he contends he was entitled to receive under the Constitutions of the United States and the State of Texas. *These points were not specifically presented to the trial court by the motion for new trial, and this court is not authorized to consider them.* Wagner v. Foster, 341 S.W.2d 887 (Tex. 1960); Wood v. State, 434 S.W.2d 149 (Tex. Civ. App.—Corpus Christi 1968); Daniels v.

> Daniels, 414 S.W.2d 207 (Tex. Civ. App.—Amarilio 1967); Baker v. Sturgeon, 361 S.W.2d 610 (Tex. Civ. App.—Texarkana 1962); City of Carrollton v. Rawlins, 291 S.W.2d 955 (Tex. Civ. App.—Eastland 1956, error ref.). (Emphasis added)

Of the failure of a party to preserve alleged error in a state trial court by proper assignment or otherwise, the United States Supreme Court in the case of *Michel v. State of Louisiana*, 350 U.S. 91, 76 S.Ct. 158 (1955), declared:

> "Petitioners' contention was not raised below, and we do not believe it has been properly put in issue, Pennsylvania R. Co. v. Illinois Brick Co., 297 U.S. 447, 463, 56 S.Ct. 556, 561, 80 L.Ed. 796. If such an allegation had been presented and preserved, and found support in the record, we might have a very different case here. See Rogers v. State of Alabama, 192 U.S. 226, 24 S.Ct. 275, 48 L.Ed. 417." See also Hanson v. Denckla, 357 U.S. 235, 78 S.Ct. 1228 (1958); Bullen v. Wisconsin, 240 U.S. 625, 36 S.Ct. 473 (1916); 14 Cyc. of Fed. Proc., 3rd Ed. 372, Sec. 67.83.

In addition to the foregoing compelling procedural reasons which preclude Petitioner from prevailing on the points in question on this appeal, the Houston Court of Civil Appeals further concluded that:

> "A consideration of appellant's points on the merits leads to the conclusion that the trial court did not err in refusing to allow recovery as separate items of damage the loss of profits sustained by appellant's business, or the moving costs incurred by appellant, as the result of the condemnation of a portion of appellant's property."

LOSS OF PROFITS

Petitioner was not entitled to recover as a separate item of damages any loss of profits allegedly arising by reason of the condemnation herein, inasmuch as such loss under Texas law can only be, and was, considered by the jury insofar as it affects Petitioner's remainder property for the use to which it was adapted and being put.

In overruling the objection made by Respondents' attorney to the initial offer and introduction of evidence as to Petitioner's loss of profits allegedly occurring by reason of this condemnation, the trial court significantly instructed the jury as follows:

> "Alright, the objection is overruled, subject however, to these instructions for the Jury. Any testimony of this witness or any other witness pertaining to any profits, if any, or losses, if any, in connection with the operation of the laundry business at or on the subject property, is admitted for the consideration of the Jury and not to show, not as evidence, tending to sustain such profits, if any, or losses, if any, as a separate item of damages, *but is admitted as affecting the market value, if it does, of the remainder of the land and improvements on the subject property after the taking* for the use to which that remainder was adapted and was being put, and for that purpose only. Subject to those instructions, the testimony may be admitted." (Emphasis added) (S.F. 107)

To a subsequent objection made to Petitioner's further showing of additional losses of profit, the Court, in again overruling such objection, declared:

> *"I'll admit the testimony* for the Jury's consideration, not as a separate item of damages, but *for*

whatever it is worth, if anything, as affecting the market value of the remaining land and improvements for the uses to which it was adapted and were being put on the subject property.

"For that purpose, and for that purpose only, you may testify only to what I have said. If you can limit your testimony to that, we'll admit it." (Emphasis added) (S.F. 339)

From the foregoing, it is clear that the trial court permitted Petitioner to show loss of profits (which Petitioner did in fact do following each of the Court's rulings quoted above—See S.F. pp. 107, 339) for the purpose of the jury's consideration in determining the market value of the remainder after the taking.

The Texas rule regarding lost profits is stated as follows in *Reilly v. State*, 382 S.W.2d 116 (Tex. Civ. App. 1964, ref. n.r.e.), a case highly similar to this one in that it involved a partial taking:

"Under the Texas decisions income or profits from a business are admissible in evidence in condemnation cases in only two situations: (1) In those cases where the landowner's business has been temporarily interrupted because of a denial of access the landowner can recover his loss of profits as an element of damage. Hart. Bros. v. Dallas County, Tex. Com. App., 279 S.W. 1111, City of LaGrange v. Pierratt, 142 Tex. 175 S.W. 2d 243, Gandy v. State, Tex. Civ. App., 293 S.W.2d 534. (2) In those cases where only a part of the landowner's land is taken, an owner may show loss of profits as an injury to his business, not as a separate item of damage, but as affecting the market value of the remaining land and improvements for the uses to which they were adapted and were being put. City of Dallas v. Priolo, 150

Tex. 423, 242 S.W.2d 176; Milam County v. Akers, Tex. Civ. App., 181 S.W.2d 719."

The taking of Petitioner's property, of course, falls into the second of the two situations as set forth by the Court in *Reilly v. State*, above.

Of the special issue regarding lost profits which Petitioner requested the trial court to submit to the jury, the Houston Court of Civil Appeals below correctly declared:

> "The requested issue was not a proper inquiry. It does not restrict the jury to a finding of profits lost by reason of a temporary disruption of its business. It was appellant's contention that by reason of the taking the property was no longer suitable for the use to which it had been devoted prior to the taking. Evidence of losses caused by permanent injury to the business was before the jury. Such a loss cannot be recovered as an item of damage separate from that resulting from the depreciation in value of the remainder. State v. Zaruba, 418 S.W.2d 499 (Tex. 1967); City of Dallas v. Priolo, 242 S.W.2d 176 (Tex. 1951); Huckabee v. State, 431 S.W.2d 927 (Tex. Civ. App.—Beaumont 1968, writ ref. n.r.e.); Reilly v. State of Texas, 382 S.W.2d 116 (Tex. Civ. App.—San Antonio 1964, ref. n.r.e.)."

MOVING EXPENSES

With regard to Petitioner's attempt to recover moving expenses incurred in the move of its business operations from the location of the property of which a part was condemned to another location in the City of Houston, Respondents had instituted suit in condemnation by the filing of their Plaintiff's Original Petition on February 25, 1969 (Tr. 9). At such time there was no Texas statutory or judicially decided law under and by which Petitioner

was entitled to reimbursement for such moving expenses. In fact the case law clearly prohibited any such reimbursement, as exemplified by the case of *State v. Vaughan*, 319 S.W.2d 349 (Tex. Civ. App. 1959, no writ history), in which it is declared:

> *"The defendants claimed and offered evidence to show expenses incurred and losses sustained in removing furniture and fixtures from the property.* It may be noted that such furniture and fixtures were not being condemned. In Herndon v. Housing Authority of City of Dallas, Tex. Civ. App., 261 S.W.2d 221, 233, er. ref., the court used language appropriate here: '* * * *it is only the real estate which is being taken, not the business. The owner may keep his business and continue to operate it at a different location.*' Here *the defendants of course could keep the furniture and fixtures and use them at other locations.* The expenses incurred and losses sustained were purely incidental and consequential to the taking of the property and *were not recoverable as damages for the taking of the property.* Evidence as to these matters was not proper and should not have been admitted." (Emphasis added)

Subsequent to the institution of this suit on February 25, 1969, the Texas Legislature passed two statutes, Section 7 of Article 3265 and Article 6674-n (renumbered as Article 3266b).

Section 7 of Article 3265, which became effective September 1, 1969, which was subsequent in time to the institution of this suit (February 25, 1969) and to the time this matter became a cause pending in court by the Petitioner's filing of its objections and exceptions to the award of the special commissioners on May 9, 1969 (Tr. 16), provides:

> "The owner of the land who is actually and physically displaced and permanently moves from his dwelling or place of business shall be entitled to, as a separate item of damages, the reasonable moving expenses for personal property other than machinery, equipment, or fixtures, not to exceed $500.00, when personal property is moved from a place of residence and not to exceed $5,000.00, when personal property is moved from a place of business, but the maximum distance of movement to be considered shall be fifty (50) miles. In no event shall such expenses exceed the market value of such personal property; *provided, however, that the provisions of this section shall not apply in any condemnation proceeding whether before special commissioners or the court where the owner is entitled to reimbursement for moving expenses under other existing law.*" (Emphasis added)

It is submitted that because of the effective date of the above Article, Petitioner could not avail itself of the provisions of said Article. In any event, the "other existing law" referred to in the emphasized proviso above would preclude Petitioner from the applicability of such statute.

Such "other existing law" at the time Section 7, Article 3265 became effective (September 1, 1969), could only have been then Article 6674n-4 (subsequently renumbered as Article 3266b), which had earlier become effective on April 2, 1969, which was, however, still subsequent in time to the institution of this suit on February 25, 1969.

Before its amendment in 1971, long after this suit had been concluded, said Article 6674n-4 (now 3266b) provided as follows:

"Section 1. When in the acquisition of right of way for any highway designated by the State Highway Commission as a part of the State Highway System it becomes necessary that any individual, family, property of a business concern, farm or ranch operation or non-profit organization be displaced they may be paid their moving expenses, relocation payments, be provided financial assistance to acquire replacement housing, or allowed rental supplements and compensated for expenses incidental to the transfer of property to the state all of which payments or expenditures are hereby declared to be an expense and cost of right of way acquisition. *The State Highway Commission shall formulate the rules and regulations necessary to carry out the provisions of this section and shall not authorize payments or expenditures in excess of those authorized by the Federal Highway Relocation Assistance Program.*

"Sec. 2. *The State Highway Commission shall provide a relocation advisory service for all* individuals, families, *business concerns,* farm and ranch operations and non-profit organizations which shall be compatible with the Federal Highway Relocation Advisory Program.

"Sec. 3. *The Comptroller of Public Accounts is hereby authorized to issue a State Warrant on the appropriate account for all relocation costs* and the costs of administering the relocation assistance program. Acts 1969, 61st Leg., p. 133 ch. 45, emerg. eff. April 2, 1969." (Emphasis added)

There can be little question from a review of the foregoing statute that what the Legislature contemplated by same was to establish a new and heretofore unauthorized program under and by which reimbursement of relocation costs could be made and which program is to be handled and conducted separately and apart from the trial of con-

demnation causes, which relate only to the taking of real estate. The statute obviously was passed to provide relief to condemnees such as Petitioner in this case, whose *business operations* are displaced as a result of the necessity of acquiring their *business location* for a state highway.

That such reimbursement of relocation costs is not contemplated to form any part of the condemnation trial involving the real estate of any business concern affected, is made clear by the statute's declaration that "The State Highway Commission shall formulate the rules and regulations necessary to carry out the provisions of this section and shall not authorize payments or expenditures in excess of those authorized by the Federal Highway Relocation Assistance Program."

Also, such statements in the statute that "The State Highway Commission shall provide a relocation advisory service for all . . . business concerns . . . which shall be compatible with the Federal Highway Relocation Advisory Program," and that "The Comptroller of Public Accounts is hereby authorized to issue a State Warrant on the appropriate account for all relocation costs . . .," clearly indicate that the Legislature by said statute contemplated a program separate and apart from the procedure to be followed in condemnation cases culminating in a trial with a jury determining the fair market value of the real estate involved.

The foregoing was the basis for the declaration by the Court of Civil Appeals below that:

> ". . . These items may well constitute 'damage' to appellant, but the cost of removing the personal property does not constitute 'damage' to appellant's 'property'. Jurisdiction of this cause of action is statu-

> tory. Article 3265, V.A.C.S., prescribes 'market value' as the test of adequate compensation in condemnation proceedings. City of San Antonio v. Congregation of the Sisters of Charity of the Incarnate Word, Inc., 404 S.W.2d 333 (Tex. Civ. App.—Eastland 1966, no writ). Neither Sec. 17, Article 1 of the Constitution nor Article 3265, V.A.C.S., authorizes the County Court to entertain a cause of action for damages in a condemnation case other than such damages to 'property' as results from a taking for public use . . ."

COSTS OF READAPTING REMAINDER

In addition to the procedural infirmity of Petitioner's complaint as to its inability to recover the costs it allegedly incurred in readapting its remainder property, its position as to the recovery of these costs during the trial below and now is a classic case of a party wanting his cake and wishing to eat it too. Petitioner, by its only two witnesses, contended at the outset of the trial and throughout its progress that by reason of the condemnation of a portion of each of the buildings on the two tracts involved in this case, the remaining portions of such buildings were rendered *totally* valueless.

First, with regard to the testimony of Petitioner's witness Robertson, this witness first stated that he had no opinion as to the value of the improvements on Petitioner's property before the taking but that after the taking the improvements left on Petitioner's remainder property had *no* value (S.F. 80, 81).

Petitioner's witness Reed testified that the value of the improvements on one tract (Tract 311) before the taking was $109,965.00, and that after the taking the value of

the improvements on the remainder was "zero." (S.F. 275, 276). With regard to the other of Petitioner's tracts (Tract 335), Reed testified that the value of the improvements thereon before the taking was $6,937.00, and that after the taking the value of such improvements on the remainder was again "zero" (S.F. 304).

It is clear from the testimony of both the witnesses Robertson and Reed that Petitioner sought in the trial of this case a 100% recovery of the total value of the improvements on both of the properties involved in this condemnation. For by contending that the value of the improvements on the Tract 311 property before the taking was $109,965.00 and that the value of the improvements on the Tract 335 property before the taking was $6,937.00 and to contend that the value of such improvements on each of the said respective remainders after the taking was zero, Petitioner clearly sought a full recovery of the total value of said improvements as they existed prior to the taking.

The attempt to recover the full value of its improvements was, of course, a legitimate goal which Petitioner was entitled to attempt to achieve; but it was the maximum amount which Petitioner was entitled to attempt to recover as to its improvements.

For the trial court to have allowed Petitioner to show the cost of adapting or readapting the improvements on the remainder for a continued use of such remainders for whatever purpose, in the light of Petitioner's attempt to recover the full value of such improvements, would clearly have been to allow Petitioner to attempt to recover an amount exceeding the overall value of such improvements. This, of course, was precisely what Petitioner sought to

achieve in attempting to have its witnesses testify to the cost of installing a new boiler and a new water softener and purification system in the remainder building on Tract 311, as well as to the cost of constructing new offices in said remainder building.

In summary, for the trial court below to have allowed Petitioner to introduce costs allegedly incurred of adapting the remainder improvements, after Petitioner's witnesses had testified that such improvements were rendered valueless by the taking and that Petitioner was thereby entitled to the full value of same in the Jury's answers to the remainder before and after issues, would simply have allowed Petitioner to seek a recovery of damages greater than that to which it was entitled, to-wit, the full value of said improvements. The trial court did not, therefore, err in refusing to permit evidence of such costs and/or to submit Petitioner's requested Special Issue No. 4 and thereby permit Petitioner to seek recovery as a separate item of damages its costs of readapting its remainder property.

For all of the foregoing reasoning and authorities, Petitioner's Questions 4 and 5 should be answered in the negative and the contention raised thereby overruled.

PRAYER

Petitioner has wholly failed to show that either the trial court, the Houston Court of Civil Appeals or the Texas Supreme Court has committed any error in this cause and has further failed to show that any of its constitutional guarantees have in any way been violated.

Wherefore, Respondents pray that Petitioner's Petition for Writ of Certiorari be in all things refused.

Respectfully submitted.

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Harris County, Texas

By Edward J. Landry
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Attorneys for Respondents

CERTIFICATE OF SERVICE

The undersigned, one of the counsel for Respondents, does hereby certify that on this 12th day of October, 1972, he did deposit in the United States mail, with sufficient postage to deliver same, two (2) true and correct copies of this Brief of Respondents, addressed to Cutrer & Jefferson, Attorneys at Law — Attention: Mr. Lewis Cutrer — 3901 Westheimer, Suite 301, Houston, Texas 77027, Attorneys for Petitioner.

EDWARD J. LANDRY
Assistant County Attorney

Edward J. Landry

APPENDIX A

IN THE

Supreme Court of Texas

April 26, 1972

No. B-3135

Pilgrim Equipment Company of Houston

vs.

The State of Texas

From Harris County
First District

Application of petitioner for writ of error to the Court of Civil Appeals for the First Supreme Judicial District having been duly considered, and the Court having determined that the application presents no error requiring reversal of the judgment of the Court of Civil Appeals, it is ordered that said application be, and hereby is, refused.

It is further ordered that applicant, Pilgrim Equipment Company of Houston, and surety, American Employers' Insurance Company, pay all costs incurred on this application.

May 24, 1972

No. B-3135

Pilgrim Equipment Company of Houston	)	
	)	From Harris County
vs.	)	First District
The State of Texas	)	

Petitioner's motion for rehearing of application for writ of error having been duly considered, it is ordered that said motion be, and hereby is, overruled.

I, GARSON R. JACKSON, Clerk of the Supreme Court of Texas, do hereby certify that the above and foregoing is a true and correct copy the orders of the Supreme Court of Texas in the case numbered and styled as above, as the same appears of record in the minutes of said Court under the dates shown.

WITNESS my hand and the seal of the Supreme Court of Texas, at the City of Austin, this, the 3rd day of August, 1972.

GARSON R. JACKSON, Clerk

By: /s/ Eugene Cervenka, Deputy
Eugene Cervenka

Affirmed, and Opinion filed November 4, 1971.
TFC/b

NO. 15,811

PILGRIM EQUIPMENT COMPANY
OF HOUSTON, *Appellant*,

vs.

THE STATE OF TEXAS, ET AL, *Appellees*.

Appeal from County Civil Court at Law
Of Harris County

This is a condemnation case. Judgment was entered based on a jury verdict. The land owner has appealed.

Six special issues were submitted to the jury. The land was taken from two separate tracts under single ownership. The issues related to the market value of the land taken and the damage to each of the tracts resulting from the taking.

Appellant's first three points complain that the judgment did not allow appellant just or adequate compensation; that the answer made by the jury to Special Issue No. 2 was conflicting and inconsistent with its answer to Special Issue No. 1; and that the answer to Special Issue No. 2 "was not supported by a preponderance of the evidence", and therefore that the court erred in entering judgment thereon.

The second and third points are based on the seventh assignment of error in appellant's motion for new trial reading: "The Court erred in not setting aside the answers of the jury to the Special Issues since such answers were inconsistent, incompatible and in sharp conflict with one another and contrary to the preponderance of the evidence introduced."

Rule 374, T.R.C.P., provides that a ground of error not distinctly set forth in the motion for new trial shall be considered as waived.

The assignment of error is directed to the entire verdict. It does not point out the particular answers that are alleged to be in conflict or inconsistent. The alleged error brought to the attention of the trial court by the assignment was the failure to set aside the verdict, which would have required a new trial. The attention of the court was not specifically directed to the point now raised, i.e., that the answers to Special Issues 1 and 2 are conflicting and inconsistent. No conflict or inconsistency is apparent from reading the issues and the answers made thereto. Appellant's Point 2 is without merit, and cannot be considered. Garvel v. Young, 407 S.W.2d 518 (Tex. Civ. App.—Houston 1966, writ ref., n.r.e.).

Since appellant, in the Amended Motion for New Trial, failed to state that the evidence supporting the jury answer to any specific special issue was either insufficient or against the great weight of the credible evidence, this court has no jurisdiction to consider Point 3. Darryl v. Ford Motor Co., 440 S.W.2d 630 (Tex. 1969).

By Point No. 1 appellant contends that the judgment based on the jury verdict did not allow appellant just

and adequate compensation required by the Constitutions of the United States and the State of Texas. The Constitution of the United States, Amendment V, requires payment of "just" compensation for property taken for public use. The Constitution of the State of Texas, Art. 1, Sec. 17, requires "adequate" compensation for property "taken, damaged or destroyed for or applied to public use."

The trial court has entered judgment for appellant in the amount found by the jury in answer to issues submitted in the language suggested by State v. Carpenter, 89 S.W.2d 194 (Tex. 1936). The question of "adequate compensation" was submitted to the jury. Brunson v. State, 444 S.W.2d 598 (Tex. 1969).

Since the answers made to these issues are supported by credible evidence, this court cannot substitute its opinion of the value of the property for that of the jury. By this point appellant does not present the question that the answers are contrary to the great weight and preponderance of the evidence. Point No. 1 is too general to constitute a basis for the reversal of the judgment. If the judgment is in fact inadequate, that result must have followed from the error of the trial court refusing to admit competent testimony offered at the trial; from the error of the trial court in manner of submitting the case to the jury; from the failure of the jury to answer the issues submitted in accordance with the weight and preponderance of the evidence; or from some such specific matter. It is appellant's burden to determine the specific matter which he contends constituted error and probably resulted in the rendition of an improper judgment. This matter must then be presented in accordance with the

procedural rules established by law or adopted by the Supreme Court to govern the trial and appeal of civil cases in this State. Art. 3266, V.A.C.S.; Hale v. Lavaca County Flood Control Dist., 344 S.W.2d 245 (Tex. Civ. App.—Houston 1961); Ingram v. Nueces County, 365 S.W.2d 838 (Tex. Civ. App.—San Antonio 1963).

Appellant contends that the trial court erred in rendering the judgment herein because appellant was entitled to recover (1) damages for the loss of profits suffered by reason of the partial taking; (2) the cost of readapting the remainder of its property for continued use as a laundry and dry cleaning plant; and (3) the moving costs caused by the partial taking.

These points of error are stated to be based on Assignments of Error Nos. 2, 3, 5, and 13.[1] The points are too

1. "Second—The Court erred in its ruling on the Motion in Limine filed by Plaintiffs herein particularly by limiting and qualifying the evidence that the Defendants could introduce concerning moving cost and cost of readapting the remainder of their property for use as a laundry and cleaning establishment and loss of profits in the operation of their business as a result of and on account of the condemnation of a part of their property which is described in Plaintiffs' pleadings filed herein.

"Third— The Court erred in refusing to admit and/or qualifying and commenting upon the evidence introduced or to be introduced by the Defendants at the trial of this cause regarding moving cost, loss of profits, cost of adapting remainder of their property for use previously made thereof and other expenses suffered and sustained by the Defendants on account of the condemnation of their property hereunder, same being in violation of Amendment V. of the Constitution of the United States and Article 1, Section 17 of the Constitution of the State of Texas, since such items represented actual damages sustained by the Defendants on account of the condemnation of their prop-

general to comply with the briefing rules. Rule 418, T.R.C.P. Neither of the points complains that the court erred in admitting evidence offered by appellant with improper qualifications, nor do they complain that the trial court erred in refusing to submit properly requested issues. The points are germane to the assignments of error only in the sense that the matters complained of in the assignments of error made it impossible for appellant to secure jury findings on which to base a judgment for the specific additional damages he contends he was entitled to receive under the Constitutions of the United States and the State of Texas. These points were not specifically presented to the trial court by the motion for new trial, and this court is not authorized to consider them. Wagner v. Foster, 341 S.W.2d 887 (Tex. 1960); Wood v. State, 434 S.W.2d 149 (Tex. Civ. App.—Corpus Christi 1968); Daniels v. Daniels, 414 S.W.2d 207 (Tex. Civ. App.—Amarillo 1967); Baker v. Sturgeon, 361 S.W.2d 610

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erty and represented just compensation to which they were legally entitled.

"Fifth — The Court erred in refusing to submit to the Jury the Special Issues which were duly and timely presented to the Court by the Defendants concerning moving cost suffered by the Defendants and also the cost of adapting the remainder of Defendants' property so that they could continue to operate a laundry and cleaning establishment thereon and also the loss of profits sustained by said Defendants on account of such partial taking, which under the preponderance, if not all of the evidence introduced, showed that due to such partial taking the Defendants had to relocate their business at substantial cost, expense and damages.

"Thirteenth—The Court erred in signing and entering the judgment for Plaintiffs herein, same being in violation of Amendment V. of the Constitution of the United States and of Article 1, Section 17 of the Constitution of the State of Texas."

(Tex. Civ. App.—Texarkana 1962); City of Carollton v. Rawlins, 291 S.W.2d 955 (Tex. Civ. App.—Eastland 1956, error ref.).

A consideration of appellant's points on the merits leads to the conclusion that the trial court did not err in refusing to allow recovery as separate items of damages the loss of profits sustained by appellant's business, or the moving costs incurred by appellant, as the result of the condemnation of a portion of appellant's property.

As a consequence of the taking on Tract 311 the building housing appellant's laundry and dry cleaning plant was severed, about 4,900 square feet of the building being within that portion of the tract taken, leaving about 8,000 square feet on the remainder. Equipment necessary to the operation of the entire plant was located within the part taken, including the steam boiler, water softener, air conditioning equipment, and a large flat press. Obviously a new wall would be required if the operations in the plant were to continue. At the time of this trial the building itself had not been severed. However, appellant had severed the water, steam, air conditioning ducts, and electrical lines prior to trial, and had removed all personal property from the area taken. This was necessary by reason of the fact that appellee had deposited the commissioners' award in the registry of the court.

There was testimony that the highest and best use of the property on June 10, 1969, the date of taking, was the use then being made of the property, that is, use of the property as a laundry, main plant and central offices, maintenance and carpenter shop, servicing a chain of 160 retail laundry and cleaning outlets. Both tracts of land, Tract 311 and 335, served as an over-all unit in

the operation of the business. The buildings on both tracts had been adapted to a special use where every square foot served a purpose. There was other testimony by expert witnesses produced by appellee that the highest and best use for the property was for laundry and dry cleaning purposes.

Appellee permitted appellant four months after the date of the taking to remove his business operations from that portion of the building taken. The business was disrupted during this period, and to some extent thereafter. Pilgrim's president testified that the remainder was not large enough for the dry cleaning assembly line, so that this operation was transferred to the Pasadena plant. There was not enough space for the large flat work ironer and a smaller one was installed in the remainder. This equipment would not take care of the work, and there was not enough storage space in which to store both the incoming material and the completed work. The company had a smaller plant on Stella Link, which it continued to operate, but it discontinued this type work at the subject property because it was not profitable in the small scale operation. At the time of the trial he had not been able to locate a suitable property for a new plant capable of handling the flat work operations.

By the end of the four month period the adminstrative offices, the carpenter shop, parts department, the labor office and the maintenance department had been transferred to another location. These activities were operated from the same location for economic reasons and there was not sufficient room in the remainder for all of them. The closing of the assembly lines in the Almeda plant made it necessary to discontinue most of the home pick-up and delivery routes.

The operation continued at the Almeda plant in the remainder at a reduced scale until it was abandoned for all purposes except as a retail pick-up and delivery station. Appellant had 160 different retail outlets. Prior to the date of taking the Almeda plant did flat work for 75% to 80% of the outlets. Appellant acquired land at 6723 Stella Link for its new main plant. It took about eighteen months to find a desirable location, purchase it, get some zoning restrictions removed, construct a building, install the necessary equipment, and begin operations. This plant was not designed for the flat work operation. Mr. Robertson, appellant's president, testified that by reason of the condemnation in his judgment it was no longer feasible to continue to operate the Almeda plant.

Appellant was permitted to introduce testimony as to the profits and losses sustained by the Almeda plant from January, 1969, to and including May, 1970, at which time the plant was shut down except for the retail operation. Substantial profits were shown for each month prior to the date of taking, and substantial losses were shown for each month after the date of taking. The trial court instructed the jury that the evidence concerning the profits and losses was admitted not as evidence tending to sustain such profits or losses as a separate item of damages, but that such evidence was admitted "as affecting the market value, if it does, of the remainder of the land and improvements on the subject property after the taking for the uses to which that remainder was adapted and was being put, and for that purpose only." Appellant made no objection to this instruction, and cannot now be heard to complain of this action of the court. Substantially the same instruction was included in the court's charge. If

objections were made to the court's charge, they were not included in the transcript.

Appellant's Requested Issue No. 1, refused by the court, reads:

> "From a preponderance of the evidence, what do you find was the amount of the loss of profits, if any, sustained by Pilgrim Equipment Company of Houston on account of the condemnation by the State of Texas and County of Harris of Pilgrim's property known as Tracts Numbers 311 and 335?"

While appellant has no point complaining of the failure of the trial court to submit this special issue, under his point charging the court with error in entering the judgment herein because of the failure to allow damages by reason of lost profits, he points to the action of the court in limiting the evidence as above set out and in refusing the special issue. These matters were sufficiently preserved in the motion for new trial. The claimed error in limiting the testimony was waived by appellant's failure to object to the instructions limiting the purpose for which the jury could consider the evidence relating to profits and losses at the various times such an instruction was given. King v. Robert, 84 S.W.2d 718 (Tex. 1935); Texas-Mexican Ry. Co. v. Creekmore, 204 S.W. 682 (Tex. Civ. App.—San Antonio 1918, err. dism'd); Mayberry v. Campbell, 356 S.W.2d 827 (Tex. Civ. App.—Amarillo 1962, writ ref., n.r.e.).

The requested issue was not a proper inquiry. It does not restrict the jury to a finding of profits lost by reason of a temporary disruption of its business. It was appellant's contention that by reason of the taking the property was

no longer suitable for the use to which it had been devoted prior to the taking. Evidence of losses caused by permanent injury to the business was before the jury. Such a loss cannot be recovered as an item of damage separate from that resulting from the depreciation in value of the remainder. State v. Zaruba, 418 S.W.2d 499 (Tex. 1967); City of Dallas v. Priolo, 242 S.W.2d 176 (Tex. 1951); Huckabee v. States, 431 S.W.2d 927 (Tex. Civ. App.—Beaumont 1968, writ ref., n.r.e.); Reilly v. State of Texas, 382 S.W.2d 116 (Tex. Civ. App.—San Antonio 1964, ref., n.r.e.).

The refusal of appellant's special issue designed to establish the expense of removing the personal property from the property taken to other property belonging to appellant was not error. These expenses might well result in a temporary loss of profit for the business. Unless compensation can be recovered for these items in that context (a question we do not decide here), it cannot be recovered in this action. These special items of damage were not specially plead, consequently it was not shown that the damage sought was within the jurisdiction of the County Court at Law in which the case was tried. These items may well constitute "damage" to appellant, but the cost of removing the personal property does not constitute "damage" to appellant's "property". Jurisdiction of this cause of action is statutory. Article 3265, V.A.C.S., prescribes "market value" as the test of adequate compensation in condemnation proceedings. City of San Antonio v. Congregation of the Sisters of Charity of the Incarnate Word., Inc., 404 S.W.2d 333 (Tex. Civ. App.—Eastland 1966, no writ). Neither Sec. 17, Article 1 of the Constitution, nor Article 3265, V.A.C.S., authorizes the County Court to entertain a cause of action for damages in a

condemnation case other than such damage to "property" as results from a taking for public use, subject to the exception contained in Sec. 7 of Art. 3265 specifically authorizing the recovery of moving expenses where the owner of land is "actually and physically displaced and permanently moves from . . . his place of business and limiting such recovery to the reasonable expense of moving the property, not to exceed $5,000.00 or the market value of such property." Appellant failed to request issues necessary for a recovery under Sec. 7. State v. Carpenter, 89 S.W.2d 979 (Tex. 1936); Kennedy v. City of Dallas, 201 S.W.2d 840 (Tex. Civ. App.—Dallas 1947, writ ref.); State v. Vaughan, 319 S.W.2d 349 (Tex. Civ. App. —Austin 1959, no writ).

Appellant's Point 7 does not present error. At several places in the record testimony was presented without objection that appellant had listed the remainder property for sale with the wall reconstructed on the south remainder. When a witness was asked "how much the real estate dealer was trying to get for the property," an objection was promptly sustained.

Appellant contends that the case must be reversed by reason of certain statements made by appellees' attorney during jury argument, contending that such argument was so prejudicial that its effect could not have been removed by an instruction from the trial judge. The attorney asked the jury "to be just as fair to the taxpayers of Harris County and the State of Texas as to the stockholders of Pilgrim Equipment Company." The arguments of counsel were not transcribed and appellees do not concede that this statement was made. An informal bill of exception is found in the statement of facts.

A review of the entire record leads us to the conclusion that no reversible error was shown. It is conceded that no objection was made at the time and that the trial judge was not requested to instruct the jury to disregard the statement. We do not think that the record demonstrates that such argument resulted in the rendition of an improper verdict or judgment. Kittrell v. State, 382 S.W.2d 273 (Tex. Civ. App.—Dallas 1964, ref., n.r.e.); Camp v. Commissioners Court of El Paso County, 279 S.W.2d 927 (Tex. Civ. App.—El Paso 1955, ref., n.r.e.).

Appellant complains of the action of the trial court in sustaining appellees' motion in limine to prohibit appellants' counsel from showing that the witness Hughes had earlier been employed by appellees to appraise appellant's property and that he was a witness for appellees at the Special Commissioners' hearing. Hughes was subpoenaed as a witness by appellant, but was not called to testify. There was no error in sustaining the motion in limine. State v. Biggers, 360 S.W.2d 516 (Tex. 1962).

The judgment is affirmed.

/s/ Tom F. Coleman

Associate Justice

Judgment rendered and opinion filed November 4, 1971.